

1710836 (Migration) [2018] AATA 1926 (18 May 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1710836

MEMBER: David Barker

DATE: 18 May 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa

Statement made on 18 May 2018 at 1:07pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Federal court remittal – Compelling reasons to waiver the Schedule 3 Criteria – Application lodged out of time – Remained unlawfully – Sponsor’s support needs during her pregnancy – Paternity of the sponsor’s child questioned – Visa applicant declined to provide DNA evidence – Birth certificate not sufficient evidence of the child’s paternity – Financial reliant on the visa applicant – Sponsor not willing to accompany the applicant to India – Decision under review affirmed

LEGISLATION

Migration Act 1958 s 65

Migration Regulations 1994 Schedule 2 cl 820.211 Schedule 3 Criterion 3001, 3003, 3004

CASES

Babici v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The issues in the present case are:
 - a) whether the applicant held a substantive visa at the time of his application or had applied within 28 days of the day his last substantive visa ceased; and, if not,
 - b) whether there are compelling reasons not to apply the Schedule 3 requirements.
2. This is an application for review of a decision of a delegate of the Minister for Immigration on 4 May 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 9 May 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. On 4 May 2015 the delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because he did not meet the Schedule 3 criteria and there were no compelling reasons to not apply that criteria.
5. On 9 May 2016, the Tribunal affirmed the decision on the basis that the applicant did not meet the Schedule 3 criteria and there were no compelling reasons to not apply that criteria. The applicant subsequently appealed to the Federal Circuit Court.
6. On 10 February 2017, the Federal Circuit Court remitted the matter for reconsideration, on the basis the Tribunal erroneously found that being in a long standing genuine relationship, on its own, is not sufficient to establish compelling reasons for the waiver requirement to satisfy Schedule 3 criterion 3001.
7. The applicant was due to appear before the Tribunal on 15 November 2017 to give evidence and present arguments. However, due to him not arriving at the Tribunal until over an hour after the hearing was due to commence, the interpreter who had been booked to assist the Tribunal was not available for a sufficient period of time to allow the hearing to proceed on this date.
8. The applicant therefore appeared before the Tribunal on 17 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
9. The applicant was represented in relation to the review by his registered migration agent.
10. At the end of the hearing, the Tribunal gave the applicant until 1 December 2017 to provide any further evidence or agreements he would like considered before a decision was made in relation to his visa application.
11. On 28 November 2017, the applicant provided the Tribunal with a copy a letter from [Hospital 1] attesting to the sponsor making an appointment for antenatal care in relation to her pregnancy.

12. On 5 December 2017, the Tribunal wrote to the applicant, inviting him to appear before it at a further hearing on 18 January 2018. On 18 December 2017, the Tribunal wrote to the applicant and indicated the further hearing was rescheduled to occur on 19 January 2018.
13. The applicant appeared before the Tribunal on 19 January 2018, to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages. On 19 January 2018, the applicant notified the Tribunal he was no longer represented by the migration agent that had to this point in time represented him.
14. On 10 April 2018, the Tribunal sent an email to the applicant, asking he provide it a copy of the birth certificate for the sponsor's newborn child. On 17 April 2018, the Tribunal received the requested the certificate which stated a male child was born on [date].
15. On 17 April 2018, the Tribunal wrote to the applicant in relation to providing him with the opportunity to provide DNA evidence of his biological connection to the sponsor's newborn child. This letter asked to the applicant to return a completed 'Acceptance/Decline of Invitation to Provide DNA Evidence' form by 8 May 2018.
16. On 30 April 2018, the applicant provided the Tribunal with further copies of the birth certificate, which he had previously provided to the Tribunal on 17 April 2018.
17. On 1 May 2018, the applicant notified the Tribunal that he had appointed a migration agent as his authorised representative and authorised recipient.
18. On 11 May 2018, the Tribunal received an email from the applicant's representative, which included a copy of a letter, dated 8 May 2018, which stated the applicant does not intend to provide DNA evidence and that the applicant would be tendering further evidence in respect of his application.
19. On 11 May 2018, the Tribunal wrote to the representative informing him the Tribunal would consider any further evidence or arguments that were provided prior to a decision being made in relation to this matter, but that it would not delay making its decision on the basis of the request outlined in their letter dated 8 May 2018. The Tribunal noted the representative indicated he would provide further submissions by the close of business on 17 May 2018, which the Tribunal would have taken into account, as far as they were relevant to the issues under consideration in this review. However, no further submissions were received from the representative or the applicant by the time of the Tribunal's decision.
20. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

21. **BACKGROUND**

22. The applicant is a national of India and is currently [age] years old. He was previously married, from February 2009 to April 2012, with that marriage ending in divorce. There were no children from that union.
23. The applicant first arrived in Australia in October 2009 on a student visa, which ceased in November 2011. He has not held a substantive visa since that date.
24. The applicant's sponsor was born in Australia and is currently [age] years old.
25. The 'Sponsorship for a partner to migrate to Australia' form states the parties first met on 1 September 2012 in Sydney, NSW. The 'Application for migration to Australia by a partner'

form states the parties first met on 6 January 2012 in [Suburb 1], NSW. They married on 12 September 2012 in [another suburb], NSW.

26. The applicant provided information to the Department in support of his application including, but not limited to the following:
 - documents regarding the parties' identities;
 - photographs;
 - written statements by the applicant and sponsor;
 - statutory declarations by a number of witnesses;
 - a copy of the parties' marriage certificate;
 - medical reports;
 - banking and financial records; and
 - emails from the applicant's migration agent.
27. In the decision record, a copy of which the applicant provided to the Tribunal, the delegate accepted the parties married on 12 September 2012 and began living with each other from that time. The delegate did not however accept the length or nature of the parties' relationship provided a compelling reason to not apply the Schedule 3 criteria.
28. The delegate expressed concern that a written statement from the sponsor did not appear to be written by her, but they accepted the sponsor was aware of the contents of this written statement. The delegate noted the applicant's claim that the sponsor suffered from [a mental health condition] as a consequence of a difficult childhood and that he had assisted her to overcome this [medical condition] and return to the workforce. The delegate noted the applicant's claim that the sponsor's [mental health condition] recurred and she resumed medication when she became aware of the applicant's visa uncertainties and that this provided a compelling reason to not apply the Schedule 3 criteria to his visa application. The delegate noted a report from a psychologist was provided to the Department, which reported the sponsor was not taking medication and provided no diagnosis in relation to the sponsor, or opinion that she was suffering from a mental health condition. The delegate noted there was no recommendation from the psychologist that the sponsor undertake further counselling. The delegate did not accept any issues arising out of the sponsor's mental health provided a compelling reason to not apply the Schedule 3 criteria.
29. The delegate did not accept the evidence available to them established the impact of a period of separation, or the sponsor's claimed financial reliance on the applicant, provided a compelling reason to not apply the Schedule 3 criteria.
30. When the applicant first applied to the Tribunal for a review of the Department's decision to refuse his application for a Partner visa, he provided further documentary evidence including:
 - photographs;
 - cards;
 - postmarked envelopes;
 - utilities accounts and other financial records;
 - banking and financial records;
 - pathology test results; and
 - medical reports.
31. When the applicant appeared before the Tribunal, on 17 November 2017, he provided further documentary evidence, including:

- a medical certificate from [Dr A], dated 16 November 2017, stating the sponsor is pregnant;
- copies of previous visa applications made by the applicant;
- photographs;
- post marked envelopes and parcel delivery details;
- birthday and anniversary cards;
- phone banking screenshots from an ANZ account ending with ****55.

32. When the applicant appeared before the Tribunal, on 19 January 2018, he provided further documentary evidence, including evidence of the sponsor's antenatal appointments and pregnancy related tests conducted in [Suburb 2], NSW.

33. **TRIBUNAL HEARINGS**

34. **The hearing on 17 November 2017**

35. ***Evidence of the applicant***

36. The applicant told the Tribunal that his relationship with the sponsor is stable and going well. He said the sponsor is currently five months pregnant.
37. The applicant said he and the sponsor met in 2011, but he initially was unable to say on what date, or even in which month they met. After the Tribunal asked him if he could give any indication of when he and the sponsor first met, he said it was in summer and he thinks it was around November or December. He said they met in a park near the [Suburb 4] RSL Club. He said they have now been together for five years and everything is going well. He said both his and the sponsor's parents are happy about their relationship. He said his father visited from India during 2016 and stayed with the parties for around four weeks. He said his father met the sponsor and her parents.
38. The applicant said when he first met the sponsor she was a bit sad but that she felt better after their friendship developed and they started talking with each other. He said they visited each other and the sponsor introduced him to her mother. He said he and the sponsor dated for a round a year before they decided to marry. He said the sponsor was suffering from [a mental health condition] before their marriage, but this improved after they married and started living together. He said since then the [mental health condition] had reduced and was almost gone. He said their relationship remains very strong, despite the problems they have experienced, such as his visa difficulties.
39. The applicant said the sponsor is pregnant and both his and her parents are very happy about this. He said the parties are also happy about the pregnancy and that their life is good. He said he has saved some money, which the sponsor knows about as he does not hide anything from her. He said he sends some of his money back to India, to be invested there, as the interest rates are higher in India.
40. The applicant said he cannot leave the sponsor alone in Australia, as she is pregnant and needs him to be with her. He said he needs to support her during her pregnancy and after the birth and that his being required to return to India whilst an offshore partner visa application was processed would have a harmful impact on the sponsor, their child and him. He said the sponsor needs him badly and this is why he sometimes takes time off work to spend time with her.
41. The applicant said the sponsor could not manage on her own, if he was required to return to India for a period of time. He said they have a lot of dreams for their future lives together and also things they want to do before the baby is born. He said they need to prepare

themselves and their home for the birth of the child. He said he would get very distressed if he was told he had to go back to India for a period of time. He said he is not sure the sponsor would cope on her own. He said she is a housewife and that she is not working. He said he meets all of their regular living expense and that she is financially reliant on him.

42. As to the sponsor's mental health, the applicant said she has some problems, which got better after they started their relationship and that a doctor told her the relationship was good therapy for her. He said the sponsor went for an assessment interview with the doctor because she was lonely and that the doctor told her to give it time and she would be happy. He said the sponsor does not take any medication for a mental health condition and has had no contact with mental health professionals, prior to, or following the appointment she had with [Dr B] in January 2015.
43. The Tribunal asked the applicant about the screen shots of ANZ bank records which were provided at the hearing and he said they were from his individual bank account.
44. The Tribunal noted the sponsor's mother accompanied the parties to the hearing and in light of this asked the applicant about his claim the sponsor would be alone and without support, if he were to return to India. He said the sponsor's mother is a support for the sponsor, but that he is a support to her financially and also as her spouse.

45. ***Evidence of the sponsor***

46. The sponsor gave evidence she could not go to India with the applicant if he was required to return there for a period of time. She said she wants him here in Australia with her. She said she has never travelled overseas and wants to stay in Australia, as this is where her family is. She said the parties' have now been together for six years and they want to remain together. She said she is pregnant and booked into a hospital here to have her baby. She reiterated that she would not accompany the applicant to India and noted that his family do not speak the English language and this is a further thing that would make it hard for her in India.
47. The Tribunal enquired about the sponsor's pregnancy, including what antenatal services she was linked with. She said she has her local doctor and is also booked in to see a nurse at [Hospital 1] in the week following the hearing. She said she has attended two consultations with her local doctor, [Dr A], about her pregnancy and that she only became aware of the pregnancy two months ago. She said she is four months' pregnant at the present time. She said she is due to have an ultrasound and undergo other tests when she goes to [Hospital 1] next week.

48. ***Oral submissions of the migration agent***

49. The migration agent submitted the evidence shows the sponsor suffered depression in the past and that the applicant is worried it would recur if the parties were separated for a period of time. The migration agent further submitted the applicant is concerned his savings would be depleted if he had to return to India, which would reduce his capacity to financially support the sponsor and their child. The migration agent acknowledged that not much evidence in relation to the sponsor's pregnancy was provided with the review application, but that further medical evidence regarding the pregnancy and the applicant's role in supporting her during the pregnancy could be provided following the hearing.

50. **The second hearing on 19 January 2018**

51. At the hearing on 19 January 2018, the Tribunal put the applicant on notice it held concerns with regard to the evidence he had provided in relation to the sponsor's pregnancy and

whether this provided a compelling reason to not apply the Schedule 3 criteria to his application for a Provisional Partner visa. The Tribunal informed the applicant it would provide him with the opportunity to provide the results of DNA testing, after the birth of the sponsor's child, to support his claims in relation to his biological connection to the sponsor's child. At this time the Tribunal also put the applicant on notice that depending on the results of DNA testing, it may schedule a further hearing and at that time take further evidence as to whether there are compelling reasons to not apply the Schedule 3 criteria and also to consider other criteria for the grant of a Subclass 820 Provisional Partner visa, including as to whether the parties were, at the time of application and at the time of decision, in a genuine and continuing relationship. The Tribunal told the applicant it may also proceed to make a decision without calling a further hearing. The Tribunal invited the applicant to provide any further evidence or arguments in relation to these issues that he would like considered prior to a decision being made in relation to his visa application.

CONSIDERATION OF CLAIMS AND EVIDENCE

52. The Tribunal raised a concern with the applicant during the hearing on 17 November 2017 about the very limited nature of the evidence provided by the applicant about the sponsor's pregnancy. In particular, whilst acknowledging the sponsor demonstrably looked pregnant and the Tribunal accepted this was the case, the medical evidence provided at the hearing consisted of a medical certificate from [Dr A], with the handwritten word '*is pregnant*' written over the crossed out term '*unfit for work*' on a pro forma medical certificate. The Tribunal respectfully put to the applicant that the evidence currently available indicated the sponsor was pregnant but gave no clear medical or objective third party opinion as to who the biological father is. As a consequence, the Tribunal gave the applicant two weeks following the hearing to provide further evidence, with a particular focus on any evidence establishing he has had involvement with supporting the sponsor during the pregnancy and whether he has attended any medical or antenatal appointments with her.
53. The further documentary evidence provided to the Tribunal on 28 November 2017 did not alleviate the concerns held by the Tribunal with respect to the aforementioned issue, as it consists of a pro forma letter from [Hospital 1] which has odd handwritten additions indicating both the sponsor and applicant are pregnant and expecting to give birth in the first week of April 2018. This note stated the sponsor attended [Hospital 1] to make an appointment for an antenatal check but did not provide any indication that the applicant attended any such follow up appointments.
54. In order to provide the applicant with the opportunity to provide further evidence and arguments in relation to this and other issues, the Tribunal invited him to a further hearing on 19 January 2018, at which time it indicated the Tribunal would not make a decision in relation to his visa application until after the birth of the sponsor's child in April 2018, at which time the applicant would be invited to participate in a DNA test to establish his biological connection to the sponsor's child. In doing so, the Tribunal was aware the biological parentage of the sponsor's child is not in itself a determinative issue in relation to whether the parties are in a genuine and continuing relationship. However, the Tribunal does consider this a relevant consideration when evaluating the general credibility which can be given to the parties' evidence and whether the birth of the sponsor's child provides a compelling reason to not apply the Schedule 3 criteria to his visa application. When considering the likely cost of DNA testing, the Tribunal was mindful of the sponsor's claims about his financial investments in India and was satisfied the cost of any such DNA testing was not a prohibitive consideration.
55. The Tribunal views with concern the applicant's declining the invitation to provide DNA evidence to corroborate his claim in relation to his biological connection to the sponsor's newborn child. The Tribunal has been forthcoming with the applicant about the concerns it

held regarding the evidence he provided as to the sponsor's pregnancy and the extent to which he had attended medical and antenatal appointments during her pregnancy. The Tribunal views with concern that the applicant has provided no explanation as to the reasons he has refused to provide DNA test results, which the Tribunal would have placed considerable weight upon if the DNA test results had established a clear biological connection between the applicant and the sponsor's child.

56. In light of the applicant's declining the invitation to provide DNA evidence regarding his biological connection to the sponsor's child, the Tribunal is not satisfied it can regard the birth certificate for the child, which identifies the applicant as the father of the child, as sufficient evidence to establish the applicant is the biological father of the sponsor's newborn child. In forming this view, the Tribunal is aware that a birth certificate will be issued by NSW Births Deaths and Marriages on the basis of information supplied to that agency and that they do not themselves undertake testing to establish the veracity of the information supplied to them by a birth mother. The Tribunal is not satisfied the applicant has provided adequate evidence or arguments in response to the concerns put to him by the Tribunal in the hearings held on 17 November 2017 and 19 January 2018.
57. The Tribunal proceeded to consider whether the applicant meets the Schedule 3 criteria, and if so, whether there are compelling reasons to not apply those criteria. It has not undertaken further consideration of whether the parties were at the time of application and at the time of this decision in a spousal or de facto relationship and has taken at face value the claim they are in a relationship.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

58. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
59. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

60. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in criterion 3001(2), as set out in the attachment to this decision.
61. In the decision record, a copy of which the applicant provided to the Tribunal, the delegate found the applicant's last substantive visa ceased in November 2013. The Tribunal has formed the view this is likely a typographical error on the part of the delegate, as the applicant last held a substantive visa when his initial Student (Subclass 572) visa ceased in November 2011.
62. The applicant's last substantive visa ceased in November 2011 and he submitted the application for a partner visa in May 2013. He did not hold a substantive visa at any stage in the intervening period. Having regard to the definition of the relevant day in criterion 3001(2) the Tribunal finds that the applicant did not make the application within 28 days of the relevant day.

63. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

64. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
65. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

66. ***Reasons for not holding a substantive visa***

67. The Tribunal noted the delegate stated the applicant's last substantive visa ceased in November 2013, however the applicant confirmed the student visa that he was granted at the time of his arrival in 2009, ceased in November 2011 and that he was not granted any further substantive visas. Therefore, the Tribunal finds the applicant arrived in Australia in October 2009 and remained in Australia after his substantive visa, a student visa, ceased in November 2011.
68. The applicant made no submissions to the Tribunal in relation to why he remained unlawfully in Australia after his student visa ceased. There is no evidence before the Tribunal that the circumstances whereby the applicant lacked a substantive visa at the time he applied for a partner visa were beyond his control. There is no evidence to demonstrate the applicant could not have returned to India.
69. After considering the evidence, such as it is, the Tribunal is not satisfied that the circumstances why the applicant did not hold a substantive visa at the time he applied for the partner visa provide a compelling reason for not applying the Schedule 3 criteria.

70. ***Length of relationship***

71. The Tribunal has considered the applicant's claims about the parties' relationship and whether they provide compelling reasons to not apply the Schedule 3 criteria. In doing so, I have considered the kinds of reasons included in the Explanatory Statement and in the Department's Procedures Advice Manual to the extent that they are relevant to the circumstances of the applicant and the sponsor. The Tribunal acknowledges either an Australian citizen child from the relationship or a longstanding genuine relationship, on their own, can be sufficient to establish a compelling reason.
72. There is some inconsistency in the evidence provided by the applicant as to when he met the sponsor and when they commenced their relationship. During the hearing the applicant was uncertain, but when pressed thought he met the sponsor in [Suburb 4] and they commenced their relationship in 2011 and probably towards the end of that year during the summer period. However, the 'Sponsorship for a partner to migrate to Australia' form provided with the visa application states the parties first met on 1 September 2012 in Sydney, NSW. The 'Application for migration to Australia by a partner' form states the parties first met on 6 January 2012 in [Suburb 1], NSW. The Tribunal has not placed undue weight on the apparent inconsistency in the evidence provided by the applicant during the

hearing, due to the length of time that has now elapsed since the circumstances of the parties' initial meeting. The Tribunal considers the contemporaneous documentary evidence is potentially more reliable but has some concern regarding the discrepancy of some nine months in claims regarding the date the parties' met on the forms provided with the visa application. The Tribunal does accept that the parties were married in September 2012 and considers this is the appropriate time from which to regard them having committed to a relationship with each other.

73. The Tribunal accepts that around five and a half years have now elapsed since the parties' marriage in 2012 and has considered whether this gives rise to a compelling reason to not apply the Schedule 3 criteria. The Tribunal notes a genuine relationship is the basic requirement for a partner visa application, and the parties have failed to further satisfy the Tribunal that the longevity of their relationship is a compelling reason that should compel the Tribunal not to apply the Schedule 3 criteria.

74. *Whether there is an Australian citizen child of the relationship*

75. The Tribunal is not satisfied the evidence currently before it clearly establishes that there is an Australian citizen child from the parties' relationship. In making this finding, the Tribunal is aware the parties' claim the applicant is the biological father of the sponsor's child and have provided medical evidence of her pregnancy and a birth certificate in support of these claims. However, the Tribunal has concern as to the weight that can be accorded to this evidence and the parties claims. The applicant was made aware of the Tribunal's concerns and declined without explanation an invitation to provide DNA evidence, which the Tribunal would have placed very considerable weight on if it had shown there was an Australian citizen child from the parties' relationship.

76. *The sponsor's support needs during her recent pregnancy*

77. Both the applicant and sponsor claimed the sponsor required the physical presence and support of the applicant during her recent pregnancy. The Tribunal has noted that the letter from [Dr C] from [Hospital 2], dated 21 December 2017, indicated the sponsor had been living in [Suburb 1] but was going to stay with her father [in regional] of NSW. The applicant notified the Tribunal of a change in his contact details to an address in [Suburb 5], NSW. The Tribunal has noted that [Suburb 5] is in the greater Sydney region and not near [regional] NSW and that the applicant has made no claim to have accompanied the sponsor to stay with her father during the latter part of her pregnancy.
78. The available evidence is that the sponsor has now given birth successfully and there is no indication in any evidence before the Tribunal that mother and child are not doing well; as a result, the Tribunal is not satisfied any reliance on support from the applicant during the sponsor's recent pregnancy now provides a compelling reason to not apply the Schedule 3 criteria.

79. *The sponsor's history of mental health conditions and adverse childhood circumstances*

80. The applicant has previously submitted that the sponsor's reliance on his support in relation to a depressive illness provides a compelling reason to not apply the Schedule 3 criteria to his visa application.
81. A report from [Dr B], psychiatrist, dated 28 January 2015, reports the sponsor reported a history of [a medical health condition], managed by medication she could not name. [Dr B] noted there was no evidence of a suicidal attempt or any other problem. [Dr B] noted the sponsor was not at the time of his assessment taking any medication. [Dr B] noted that it

appeared the parties were in a very close relationship and that there was a risk she would experience a lot of distress and start having depressive symptoms again if the applicant was required to leave Australia while his partner visa application was processed.

82. During the hearing, the applicant said the sponsor does not take any medication for a mental health condition and had no contact with mental health professionals, prior to, or following the appointment she had with [Dr B] in January 2015. Further to this, he told the Tribunal her sadness improved after they commenced their relationship and whilst her worries came back when his visa difficulties became apparent, she has not required assistance from any mental health services or other health [professionals].
83. The Tribunal has considered the sponsor's evidence as to her reliance on the applicant and accepts she would not accompany him to India for the period it took for a visa application to be processed, if he was to be required to apply for a partner visa from an offshore location. The Tribunal accepts the sponsor may be impacted by a period of physical separation. However, the Tribunal is not satisfied that the available evidence demonstrates this would result in her experiencing a level of distress that would be beyond her ability to manage with the supports that would otherwise be available to her.
84. The Tribunal is aware the sponsor is reported to have experienced a difficult childhood, including reports that she was in out of home care for a period of time. The Tribunal has however noted her mother accompanied the sponsor to Tribunal's hearing and whilst her ability to financially support the sponsor is reported to be constrained by her own financial circumstances, there was no evidence put before the Tribunal that she is anything but a positive and supportive feature in the sponsor's current life. There is also an indication in the evidence provided to the Tribunal on 19 January 2018 that the sponsor was moving to stay with her father during the later stages of her pregnancy, presumably because he is also a supportive figure in his life. The Tribunal has no evidence before it to suggest this is not the case at the present time.
85. For these cumulative reasons the Tribunal is not satisfied that a mental health condition affecting the sponsor, or her reliance on support from the applicant in relation to any such mental health condition, provides a compelling reason to not apply the Schedule 3 criteria.

86. *The sponsor's physical medical conditions*

87. The applicant has previously provided the Tribunal with a report from [Dr D], dated 30 June 2014, which reports the sponsor tested positive for [a medical condition]. The Tribunal is aware [this medical condition] is a common disease that is easily curable and that the sponsor's condition appears to have been treated through medical intervention. The applicant made no claim during the hearings that the sponsor's 2014 [medical condition] provides a current compelling reason to not apply the Schedule 3 criteria to his application for a partner visa. The Tribunal has reviewed the available evidence and is not satisfied it demonstrates any physical medical condition associated with this illness, or other physical medical conditions impacting on the sponsor, provide a compelling reason to not apply the Schedule 3 criteria.

88. *Termination of past pregnancy*

89. The applicant has previously claimed a miscarriage suffered by the sponsor provided a compelling reason to not apply the Schedule 3 criteria to his visa application. Further evidence provided by the applicant in the form of a report from [Dr D], dated 18 June 2014, reports the sponsor terminated a pregnancy, gestation at 9.5 weeks, on 18 June 2014, with no complications. The applicant's representative submitted the termination was due to the sponsor's health deteriorating because of [details deleted]. The Tribunal accepts this

experience would have been distressing for the sponsor, but is also mindful that miscarriages or pregnancy related difficulties during the early stage of pregnancy are not uncommon. In light of the time that has now elapsed since 2014 and the apparent lack of acute mental health problems affecting the sponsor, the Tribunal is not satisfied the sponsor's termination of a pregnancy in 2014 provides a compelling reason to not apply the Schedule 3 criteria. The Tribunal has also noted the applicant made no claim during the hearings he attended in November 2017 or January 2018 that this issue provided a compelling reason at the present time.

90. *Impact of separation*

91. In relation to the impact of separation, I accept the sponsor has indicated she would not accompany the applicant to India for the period he may be required to remain in his home country whilst an offshore application for a partner visa is processed. However, in relation to any emotional distress and difficulty the applicant and sponsor did experience as a consequence of a period of separation, the Tribunal notes that all applicants who apply for offshore partner visas must wait while the visa application is processed and tolerate some level of physical separation. Couples who are in a genuine relationship and who may be separated from each other for a period of time can keep in contact and provide support to each other through holiday visits, frequent telephone, electronic or other means of contact.
92. The Tribunal accepts the sponsor would not accompany him to India, however, I can see no reason the parties could not, in a way many people do, continue to provide a degree of emotional support and reassurance to each other during any period of separation which may occur. The Tribunal notes an off-shore application for a partner visa takes a limited period of time to be processed and does not in and of itself result in the permanent separation and a breakdown of a couple's relationship.
93. The Tribunal is not satisfied the impact of a limited period of separation provides a compelling reason to not apply the Schedule 3 criteria.

94. *Financial hardship*

95. The applicant has claimed the sponsor could not meet her regular living expenses if he had to depart from Australia for a period of time, as she is a housewife and he is the sole income earner in their household. The Tribunal noted there is little evidence on what funds may be available to the sponsor without the applicant's support, for example, through savings, friends or relatives. There is also no indication as to the sponsor's entitlement to income support payments from Centrelink or of the amount of family tax benefit payments she may now be entitled to receive due to the recent birth of her child.
96. The Tribunal accepts the applicant's evidence that he has investments in India and can see no plausible reason the applicant could not access the financial assets and other savings or assets he may have, both for his self-support during the time he is in India whilst an offshore partner visa application was processed, but also to continue to provide the sponsor with financial support during the limited period they may be separated as a result of his temporary departure from Australia. The Tribunal has also noted the applicant has previously applied for student visas on the basis of financial support provided to him by his parents and the Tribunal has no evidence before it to suggest his parents would not continue to assist him meet his financial responsibilities.
97. The Tribunal is not satisfied the applicant has established that potential financial hardship to the sponsor, or to him, provide a compelling reason to not apply the Schedule 3 criteria.

98. **Overall assessment**

99. The Tribunal has considered the applicant's circumstances singularly and cumulatively. The Tribunal does not find the circumstances provided either on their own or in combination give rise to compelling reasons for the waiver. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
100. The Tribunal has found that the applicant does not meet criterion 3001 and that there are no compelling reasons to waive the Schedule 3 criteria. The Tribunal is not satisfied that the applicant meets cl.820.211(2)(d)(ii). There is no evidence that the applicant meets the alternative criteria in cl.820.211(3) – (9).

101. **DECISION**

102. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and

- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.